

STATE OF MICHIGAN
COURT OF APPEALS

SAF CONSTRUCTION, INC., f/k/a CRESCENT
BUILDERS,

UNPUBLISHED
September 25, 2008

Plaintiff/Counter-Defendant,

v

No. 278376
Macomb Circuit Court
LC No. 96-002352-CH

AKR & ASSOCIATES,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellee,

and

SIRAJUDDIN AHMAD,

Third-Party Defendant-Appellant,

and

PLANTE & MORAN, P.L.L.C.,

Defendant.

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Third-party defendant, Sirajuddin Ahmad, appeals as of right from the bench trial judgment awarding defendant/counter-plaintiff/third-party plaintiff, AKR & Associates (AKR), \$123,814 in damages based on Ahmad's breach of fiduciary duty. The trial court conducted a hearing and entered this award following remand from this Court. *SAF Constr, Inc v AKR & Assocs*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2004 (Docket No. 241980). We affirm.

Following a jury trial, a verdict was rendered against plaintiff SAF Construction, Inc., and in favor of AKR. In addition to the jury trial, the circuit court presided over equitable claims and concluded that third-party plaintiff AKR (hereinafter "plaintiff") prevailed over third-party defendant Ahmad (hereinafter "defendant"). Consequently, the trial court ordered defendant to provide financial information to allow the court to make a ruling with regard to damages.

Ultimately, the trial court found that defendant did not abide by the court's order requiring financial disclosure. In addition to ordering a sanction, the parties were to agree to the selection of an impartial certified public accountant to conduct a full accounting regarding defendant's breach of fiduciary duties. The trial court subsequently entered an award consistent with a revised accounting report. Defendant appealed the trial court's decision to enter an award without allowing the opportunity to cross-examine the CPA, Mark Robinson, and this Court agreed, holding:

But we agree that the trial court erred by adopting Robinson's report without affording appellants an opportunity to challenge the findings and conclusions in his report. Although we conclude that Robinson's appointment was proper under MRE 706, that rule provides that "[t]he witness shall be subject to cross-examination by each party." A party's right to cross-examine witnesses is a basic due process right, which should not be unduly interfered with by the trial court. *Hayes v Coleman*, 338 Mich 371, 380; 61 NW2d 634 (1953); *Bonelli v Volkswagen of America, Inc.*, 166 Mich App 483, 502; 421 NW2d 213 (1988). Accordingly, the trial court erred by adopting Robinson's report and recommendations without affording appellants an opportunity to cross-examine Robinson concerning his various findings and conclusions. We therefore reverse the trial court's judgment awarding damages against Ahmad for breach of fiduciary duty and remand this matter to the trial court so that appellants may be afforded an opportunity to cross-examine Robinson concerning his final report. [Docket No. 241980, slip op p 4.]

On remand, a successor trial judge presided over the hearing, but nonetheless rendered an award in favor of plaintiff based on the expert's report and in accordance with the earlier ruling of the prior circuit judge.

Defendant first alleges that the trial court erred in awarding damages premised on the expert testimony that did not include any analysis, findings, or conclusions. We disagree. A damage award rendered in a bench trial is reviewed for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id.* It is the function of the trier of fact to resolve questions of credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd.*, 209 Mich App 165, 174; 530 NW2d 772 (1995). A damage award is not clearly erroneous if it is within the range of evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 516; 667 NW2d 379 (2003). A remand is appropriate where the trial court's dispositional holding is insufficient for this Court to determine whether the trial court reached the proper result on the basis of its findings of fact. *Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489; 608 NW2d 531 (2000). In the present case, the damage award rendered was within the range of evidence presented, and therefore, we cannot conclude that the decision was clearly erroneous. *Marshall Lasser, supra.*

Defendant next asserts that he was improperly denied a trial on the issue of damages. We disagree. The law of the case doctrine provides that once an appellate court passes upon a legal question and remands for further proceedings, the legal question cannot be determined differently on a subsequent appeal in the same case where the facts remain materially the same.

Grievance Administrator v Lopatin, 462 Mich 235, 259; 612 NW2d 120 (2000). The law of the case doctrine applies to issues implicitly or explicitly decided in the prior appeal. *Id.* at 260.

Review of the brief filed by defendant in the underlying appeal revealed that it raised the limited issue of the propriety of the adoption of the expert's findings as an improper delegation of authority without the opportunity to challenge the expert's findings. Examination of the prior appeal brief indicated that defendant never challenged the scope of the testimony to be presented at the hearing on damages or the need to present additional witnesses. The Michigan Court of Appeals functions as a court of review charged with the duty of correcting errors. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). Moreover, a party may not harbor error as an appellate parachute by assenting to action at trial and subsequently raising the issue in an appeal. See *Marshall Lasser, supra*. Defendant did not challenge the extent of the testimony or witnesses presented at the prior appeal, but rather the brief principally took issue with the delegation of authority. Thus, defendant's challenge in this second appeal is without merit.¹

Lastly, defendant alleges that the award of damages on remand was deficient because the successor court failed to make independent factual findings and rulings, but merely adopted the prior decision of the trial court. We disagree. MCR 2.517(A)(2) merely requires that the factual findings and conclusions rendered by the trial court be brief, definite, and pertinent. See also *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 355; 711 NW2d 801 (2005). Review of the record reveals that the trial court complied with this standard and did not merely adopt the prior ruling without discussion.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

¹ Similarly, defendant also raises a challenge to the qualifications of expert Robinson. However, review of the orders in the lower court file revealed that the parties were to agree to an impartial expert. The trial court initially ruled in favor of plaintiff on the equitable claims on July 13, 1999. On April 12, 2000, the trial court ruled that sanctions were necessary because defendant deliberately failed to provide discovery regarding the issue of damages. The trial court's damage award was rendered on April 9, 2002. The claim of appeal from that award did not challenge the qualifications of Robinson. In light of these circumstances, defendant waived review of this issue because he may not harbor error as an appellate parachute. *Marshall Lasser, supra*.